

prior to that I was employed for approximately two years as counsel to several mutual funds. I came to that position after two years on the staff of the Securities and Exchange Commission.

I have had the opportunity to become acquainted with and to observe a large number of persons in the mutual fund industry. I believe that, in the main, the public is fortunate that this industry is managed by responsible and honest men. I believe that most of its managers are concerned with their responsibility for the welfare of small investors and, indeed, they think of their industry as the special medium for the small investor. I believe that H.R. 9510 and H.R. 9511 is in the interest of both the small investor and the industry.

My statement is given in my individual capacity and not as a representative of any organization. However, my views with respect to this bill are not entirely singular. Shortly after the S.E.C.'s Mutual Fund Report was published in December 1966, I discussed with a number of my colleagues at different universities, the desirability of forming a committee in order to demonstrate that support for mutual fund reform existed outside the Commission. Accordingly, a committee of 15 law professors, plus one professor of finance, Professor Edward Herman, of the Wharton School of Finance, came into existence to lend our modest support to this proposal. While we may not have an identical point of view on each specific item in the bill, all of us are of a mind that the investment company industry is in need of reform and that the proposals embodied in the bill before you, represent sound reform. The Committee membership was composed entirely of persons free to speak their individual opinions without fear of embarrassing any interest they represent. I am acquainted with many lawyers who share the views I express, but cannot speak out because of the loyalty they owe to their clients. I am convinced that support for this bill is much wider than the industry would have one believe.

I shall discuss the three major areas of concern in H.R. 9510 and H.R. 9511; management fees, sales loads and contractual plans.

Insofar as management fees are concerned, I consider the bill a modest proposal; much more drastic medicine might have been suggested. The structure of the typical mutual fund is at variance with that of most American corporations. The fund has no means for managing its own affairs. While the fund directors may make broad and necessarily vague policy decisions, the responsibility for defining and implementing those decisions is delegated to an outside group which charges a fee for the service. The outside group is no stranger to the fund; it usually consists of a corporation owned by the persons who created the fund, and who usually sit as members of the fund's board of directors. The delegation to this outside manager is performed by the directors who have no affiliation with it, but who, in turn, were selected by those who are affiliated.

Clearly, a director of a corporation is a fiduciary to his corporation and, in accordance with most modern judicial opinions, to the individual shareholders of that corporation as well. The investment advisor, dominated by directors of the fund and performing those tasks which most corporations perform for themselves, should similarly be viewed as a fiduciary, if not by the courts then certainly by Congress. He is, of course, entitled to compensation when he renders services, notwithstanding the fact that the board of which he is a member determined the amount. But in his relationship as a fiduciary, he has learned to exercise restraint in the amount of his compensation which he directs the company to pay to him. If he failed to think of himself as a fiduciary, and instead regarded himself as a stranger dealing at arm's length, his good conscience would impose less restraint on the amount of his compensation he arranges to have paid to himself. Thus, this first and perhaps most important safeguard against excessive compensation would be broken down if the manager of the corporation thought that he was under no obligation to view the interests and welfare of the corporation and its owners when his fee was established. I submit to you that responsible representatives of the industry have stopped thinking of themselves as fiduciaries to the corporation and its owners. Thus, an esteemed attorney to the mutual fund industry stated at a conference at the University of Pennsylvania earlier this year that the adviser "is not a fiduciary as far as his fee is concerned. There he contracts with the stockholders and the stockholders are represented by the independent directors." (115 U. of Pa.L.Rev. 726, 745, Comments of Alfred Jaretzki, Jr.) Under this view, self restraint, becomes vitiated and protection against excessive compensation is shifted to the board members least involved in managing the affairs of the funds. I believe this view is erroneous and it has been permitted to de-